

REMARKS**Election/Restriction**

The Office Action indicates that "restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-11, drawn to a device, classified in class 385, subclass 129.
- II. Claims 12-22, drawn to a device fabrication method, classified in class 438, subclass 31."

Applicants provisionally elect with traverse to prosecute the invention disclosed in Group 1, claims 1-11.

As provided in 35 U.S.C. § 121, restriction to one of two or more claimed inventions is proper only if the inventions are "independent and distinct." In its discussion of the propriety of restrictions, MPEP § 803 provides that if search and examination of two or more inventions can be made without "serious burden," the Examiner must examine them on the merits even if the claims are directed to distinct or independent inventions.

In the interests of equity and fairness, Applicants should be entitled to pursue different types of claims in the present application, particularly, system claims and method claims, for the patent to fully protect the invention, because there is a different body of law pertaining to each of these different types of claims. The restriction requirement is therefore unfair to the Applicants, because it will require the Applicants to file and bear the additional cost and time associated with filing one or more divisional or continuing applications in order to cover each type of claim.

In the present case, Groups I and II, although not necessarily obvious in view of each other, are very similar in subject matter. More specifically, each pertains to growth of an optical waveguide core mesa on a growth surface that is covered with a cladding layer. For this reason, Applicants respectfully submit that the inventions described in these claims are not "independent" as defined in MPEP § 803 and that the restriction requirement therefore is improper as between Groups I and II. In such a situation, where there is significant overlap in subject matter it would not be overly burdensome on the Examiner to check for both of these "separate" inventions at the same time.

For at least the foregoing reasons, Applicants respectfully traverse the restriction requirement and respectfully request the Examiner to examine the claims of Groups I and II

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(claims 1-22) together. Applicants expressly reserve the right to present the non-elected claims, or variants thereof, in continuing applications to be filed subsequent to the present application.

CONCLUSION

Should the Examiner have any comment regarding the Applicants' response or believe that a teleconference would expedite prosecution of the pending claims, Applicants request that the Examiner telephone Applicants' undersigned attorney.

Respectfully submitted,

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